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76-5051



IN THE

# Supreme Court of the United States

**October Term, 1976.**

No.

ISAAC LORA, by his mother and legal guardian, CARMEN LORA; KELVIN WALTERS, by his mother and legal guardian, RITA WALTERS; RANJEET MARTIN, by his mother and legal guardian, MELBA MARTIN; JEROME MOORE, by his mother and legal guardian, THELMA MOORE; LAWRENCE WHITE, by his mother and legal guardian, MULVININA WHITE; MELVIN PRINCE, by his mother and legal guardian, JOANN PRINCE; FRANCISCO LUGO, by his attorney, CHARLES SCHINITSKY, on behalf of themselves and all others similarly situated,

*Petitioners,*

*against*

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

*Respondents.*

## Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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*Attorneys for Petitioners*

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IN THE

# Supreme Court of the United States

October Term, 1976.
No.

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ISAAC LORA, by his mother and legal guardian, Carmen Lora; KELVIN WALTERS, by his mother and legal guardian, Rita Walters; RANJEET MARTIN, by his mother and legal guardian, Melba Martin; JEROME MOORE, by his mother and legal guardian, Thelma Moore; LAWRENCE WHITE; by his mother and legal guardian, Mulvinina White; MELVIN PRINCE, by his mother and legal guardian, Joann Prince; FRANCISCO LUGO, by his attorney, Charles Schinitsky, on behalf of themselves and all others similarly situated,

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THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

*Respondents.*

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.**

To: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioners pray that a Writ of Certiorari be issued to review the judgment, order and decree of the United States Court of Appeals for the Second Circuit entered in the above case on July 20, 1976.

## Opinions Below.

The decision and order of the District Court for the Eastern District of New York are printed in Appendix "A" and are unreported. The order of the United States Court of Appeals for the Second Circuit entered on May 5, 1976, dismissing the appeal and a transcript of the oral decision in support of said order are printed, respectively, in Appendix "B" and Appendix "C." The order of the Court of Appeals denying petitioners' request for a rehearing en banc entered on July 20, 1976, is printed in Appendix "D."

## Jurisdiction.

The decree of the United States Court of Appeals for the Second Circuit, upon which certiorari is sought, was dated and filed on May 5, 1976. An order denying a petition for a rehearing, timely filed on May 19, 1976, was dated and filed on July 20, 1976.

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

## Questions Presented.

1. Whether a federal district court order denying class certification in an action for declaratory and injunctive relief brought under the Civil Rights Act by minority group public school children is an appealable order because it not only narrowed the scope of possible injunctive relief, but was "final" in nature, ringing the "death knell" of the action?

2. Whether the federal district court improperly denied petitioners' motion for class certification on the ground that class certification was "unnecessary?"



## Statutes Involved.

The statutory provisions involved are Rule 23 of the Federal Rules of Civil Procedure, 28 U.S.C., p. 289; 28 U.S.C. §1291; and 28 U.S.C. §1292(a) (1). See Appendix "E."

## Statement of the Case.

This is a civil rights action instituted by seven Black and Hispanic youths who were placed into "special day schools for the socially maladjusted and emotionally disturbed," operated by the New York City Board of Education, also known as "SMED" schools, and formerly named "600" schools. The basis for federal jurisdiction over the action, brought in the Eastern District of New York, was the Fourth, Eighth, Thirteenth and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §§ 1981, 1983 and 2000(d) and 28 U.S.C. §1343 (3) and (4).

Petitioners allege that the SMED schools constitute a racially discriminatory and educationally deficient school system which promotes the exclusion of minority group children from the regular school system. Over 92% of the SMED school population of about 2,800 is Black and Hispanic, while about 60% of the regular school system is Black and Hispanic.

Petitioners further claim that they were classified as "socially maladjusted and emotionally disturbed" and segregated into the SMED schools without necessary due process safeguards. Moreover, even assuming, *arguendo*, that SMED school children have difficulty adjusting to the structure of the regular school class as it presently operates, petitioners contend that less restrictive and racially segregated and more effective educational alternatives

could be made available to them. Therefore, they claim *inter alia* that their rights, *and* the rights of other minority group children now segregated into the SMED school system, to due process, equal protection and equal educational opportunity have been violated by the defendants.*

In the court below, petitioners sought to represent a class pursuant to Rule 23 of the Federal Rules of Civil Procedure consisting of themselves and the other minority students segregated into the SMED schools. There are presently seventeen SMED schools, all at the junior and senior high school level. The total student population is about 2,800. Although petitioners' allegations presented the paradigm circumstances for class action certification under Rule 23(b) (2) of the Federal Rules of Civil Procedure, the district court denied petitioners' motion, without determining whether the prerequisites for a class action under Rule 23 were met. Erroneously relying on *Galvan* v. *Levine,* 490 F.2d 1255 (2d Cir. 1973), *cert. denied,* 417 U.S. 936 (1974), and paraphrasing the Corporation Counsel's statement in an affidavit that defendants would halt any actions as to all SMED students determined to be unconstitutional, the lower court, without holding any hearing, determined that:

> It is unnecessary to consider whether the requirements of Rule 23 have been satisfied, because the court . . . concludes that a class action status is unnecessary.

*The action was brought against officials of both New York City and New York State. The State defendants are Ewald Nyquist, the Commissioner of Education, and three officials (Rios, King, Detore) of the Division for Youth. Although the State defendants submitted an Answer, they did not otherwise participate in the lower court motions or appeals and can be expected not to participate in the instant petition for certiorari. The State defendants are represented by the New York State Attorney General, and the other defendants are represented by the New York City Corporation Counsel.



See Appendix "A."*

Appealing to the Second Circuit, petitioners argued that District Judge Bruchhausen's order was both appealable and erroneous because, without considering the merits of their complaint, he not only narrowed the scope of possible injunctive relief, but rang the "death knell" for the plaintiffs, all of whom are teenage students who could not retain standing until the case could be fully litigated.

Not mentioning any of the Supreme Court or other Circuit Court decisions cited by petitioners in support of their argument, the panel hearing the appeal (Hays, Mulligan, Palmieri) ruled from the bench that the lower court order denying class certification was nonappealable and, anyway, was proper since relief for the named plaintiffs "would inure to the benefit" of the class. See Appendices "B" and "C." On July 20, 1976, petitioners' request for

*In *Galvan v. Levine, supra,* the district court found the application of a state unemployment compensation statute to be unconstitutionally applied to Puerto Ricans. The Second Circuit held that class action designation would be a mere formality and, therefore, need not be granted. It specifically found that denial of class status would *not* "ring a death knell on the prosecution of the action" since a final decision had already been made in favor of the named plaintiffs, the City had submitted an affidavit stating that it understood the *entered judgment* to bind it to all claimants, and, in fact, the defendants already had withdrawn the challenged policy even more fully than the court directed. No conceivable mootness question existed nor did denial of class action status create possible prejudice to full litigation of the issues raised or the relief sought.

a rehearing en banc on the class action issue was denied without a vote being taken. See Appendix "D."*

**Reasons for the Allowance of the Writ.**

**The petition for certiorari should be granted because the decree of the Second Circuit Court of Appeals conflicts with decisions of other Courts of Appeals on the same matter and involves an important question of federal law which has not been, but should be, settled by this court.**

The Second Circuit has ignored the decisions of several other circuits which have found orders denying class certification in civil rights actions wherein system-wide injunctive relief is sought to be appealable. The appellate court has established an arbitrary judicial screen, contemplated neither by the Constitution nor Congress, which can only be viewed as a repudiation of the line of cases since *Brown* v. *Board of Education,* 347 U.S. 483 (1954), which have recognized the use of class litigation by minority group school children to vindicate deprivation of constitutional rights. A dangerous precedent has been set whereby federal courts can disregard the intent of Rule 23(b) (2) to enhance judicial economy and provide a remedy for a class of persons in civil rights cases.

*Petitioners' appeal from a later order of Judge Bruchhausen denying a preliminary injunction on their procedural due process and a Fourth Amendment claim only was consolidated with the class action appeal. That order was affirmed from the bench. Petitioners are not seeking certiorari on that question. The initial written order of the Second Circuit on May 5, 1976, was in error in that both the lower court order denying a class action and the lower court order denying a preliminary injunction were "affirmed." However, the Second Circuit issued an amended order on May 5, 1976, dismissing the appeal from the order denying class certification, thereby conforming to its decision.



Most importantly, the Second Circuit failed to heed the warnings of the Supreme Court that class certification may be necessary in some cases to prevent mootness. *Board of School Commissioners* v. *Jacobs,* 420 U.S. 128 (1975); *Sosna* v. *Iowa,* 419 U.S. 393 (1975); *Weinstein* v. *Bradford,* 423 U.S. 147 (1976).

Dismissal of petitioners' appeal was tantamount to a finding that a district judge has unreviewable discretion to deny class certification, regardless of its appropriateness under Rule 23, even though no individual plaintiff can maintain standing long enough to prosecute fully the action.

The case at bar gives the Supreme Court an excellent opportunity to set forth workable standards for the federal courts to follow in resolving class certification requests where the named plaintiffs may lose standing prior to full litigation.

As a general rule, an order denying class action certification which permits the individual case to proceed, is not a "final" order which may be appealed as of right under 28 U.S.C. §1291. Nor is it an interlocutory order of the kind from which an immediate appeal may be taken under 28 U.S.C. §1292. *Eisen* v. *Carlisle & Jacquelin ("Eisen I"),* 370 F.2d 119, 120 (2d Cir. 1966), *cert. denied,* 386 U.S. 1035 (1967); *Jones* v. *Diamond,* 519 F.2d 1090, 1095 (5th Cir. 1975). See also *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974). However, several federal appellate courts have developed exceptions to the general rule which the Second Circuit's decree contradicts. Additionally, the Second Circuit failed to consider

the flexible standards for determining appellate jurisdiction established by the Supreme Court.

**A. Appealability under 28 U.S.C. §1292(a)(1).**

Petitioners do not allege that they alone are being deprived of equal educational opportunity and procedural due process and are being racially discriminated against. Rather, they contend that such deprivations are common to a large class of minority group children. Their complaint sought permanent injunctions, on behalf of the named plaintiffs *and* members of their class, sufficient to rectify the unconstitutional acts and omissions alleged.

The district court's order denying class action certification has, in effect, narrowed the scope of injunctive relief available to petitioners and, therefore, the Second Circuit's unwillingness to hear the appeal from that order conflicts with the opinions of other Courts of Appeals.*

In *Brunson* v. *Board of Trustees of School District No. 1 of Clarendon County South Carolina,* 311 F.2d 107 (4th Cir. 1962), *cert. denied,* 373 U.S. 933 (1963), Black children sought injunctive relief against a school board which was allegedly maintaining a biracial school system. The district court dismissed the class action, allowing the suit to proceed only on an individual basis. The Fourth Circuit took jurisdiction over an appeal from the district court's order under §1292(a)(1), stating at 108 that:

*Interestingly, the Second Circuit accepted jurisdiction of an appeal from a pre-trial discovery order *against* school officials on the theory that the order "inclines more to the side of mandatory injunctive relief." *Parents Comm. of Public School 19 v. Community School Board 14 of New York City,* 524 F. 2d 1138, 1141 (2d Cir. 1975).



> The order . . . was a denial of the broad injunctive relief which the plaintiffs sought, which presumably, would have affected all schools and all grades in the School District. The order was, therefore, an appealable one under §1292, for it was a denial of the broad injunctive relief which the plaintiffs sought.

Several other circuits have followed the reasoning of the court in *Brunson* and have taken jurisdiction over appeals, under §1292(a)(1), from orders denying class actions when "the substantial effect [of the order] is to narrow considerably the scope of any possible injunctive relief in the event plaintiffs ultimately prevail on the merits." *Yaffe* v. *Powers,* 454 F.2d 1362, 1364 (1st Cir. 1972); see *Jones* v. *Diamond, supra,* at 1095-1097; *Price* v. *Lucky Stores, Inc.,* 501 F.2d 1177 (9th Cir. 1974).*

Significantly, although the Third Circuit rejected use of the "death knell" doctrine in *Hackett* v. *General Host Corporation,* 455 F.2d 618 (3rd Cir. 1972), *cert. denied,* 407 U.S. 925 (1972) (see Subpoint "B" *infra*), it realized at 622 that:

> . . . *Eisen* is not needed to afford interlocutory appellate review in those cases in which the refusal to grant class action designation amounts to a denial of a preliminary injunction broader than would be appropriate for individual relief. 28 U.S.C. §1292

*Not only has petitioners' remedy been narrowed, but their ability to present the very heart of their case has been severely crippled. With an action concerning violations only as to themselves, the named plaintiffs are not entitled to the class-wide discovery so material and necessary for them to prove that constitutional infirmities exist throughout the SMED school system (for example, access to the records of class members).

> (a)(1). . . . *This category of interlocutory appeals is adequate, we think, to protect against most district court inhospitality to class action litigation involving civil rights.* . . . (emphasis added)

By condoning the district court's action of arbitrarily cutting out "the heart of the relief" petitioners sought (*Jones* v. *Diamond, supra,* at 1095), the Second Circuit rejected the decisions of the First, Third, Fourth, Fifth and Ninth Circuits.

**B. The District Court order was final in nature.**

The Second Circuit's order dismissing petitioners' appeal is inexplicable in light of the teaching of the Supreme Court that, in some cases, a class needs to be certified in order to prevent termination of the lawsuit prior to exhaustion of appellate review on the ground of mootness.

In *Jacobs, supra* at 130, the Supreme Court held an action on behalf of a group of high school students to be moot because by the time the case reached the Supreme Court, plaintiffs had graduated.

> The need for definition of the class purported to be represented by the named plaintiffs is especially important in cases like this one where the litigation is likely to become moot as to the initial named plaintiffs prior to the exhaustion of appellate review.

See also *Sosna* v. *Iowa, supra; Weinstein* v. *Bradford, supra;* concurring opinion of Justice Marshall in *Preiser* v. *Newkirk,* 422 U.S. 395 (1975); and *Jimenez* v. *Weinberger,* 523 F.2d 689, 700 (7th Cir. 1975) where Mr. Justice



Stevens, citing *Jacobs* just before his Supreme Court appointment, emphasized the necessity of an early court decision on whether a case is to proceed as a class action because of several reasons, including the "risk that the failure to certify may result in a dismissal of an entire case if the claim of the named plaintiff should become moot."

At the time the instant complaint was filed, all the named plaintiffs were assigned to SMED schools. In seeking class action status, appellants informed Judge Bruchhausen that class certification was necessary to preserve the forum. They emphasized that the issues raised, by their very nature, would not remain ripe for the named plaintiffs until the lower court proceedings were completed *and* appellate review was exhausted. See *Jacobs, supra.*

The SMED school system contains students only at the junior high school and high school levels. The population is transient. The time spent in SMED school placement is substantial in the life of a young person, but all the named plaintiffs will leave the SMED and regular school systems prior to the exhaustion of appellate review.

Events subsequent to appellants' lower court class action motion substantiate the accuracy of projections concerning the problem of mootness. Of the four named plaintiffs still in SMED school placement at the time of said motion, one has moved out of the state (Lora), and the remaining three (Walters, Martin, Lugo) have been returned to the regular public school system "on a trial basis."

The case presently escapes mootness under the theory that the issues raised are "capable of repetition, yet evading review." *Dunn* v. *Blumstein,* 405 U.S. 330, 333 (1972); *Moore* v. *Oqilvie,* 394 U.S. 814 (1969). Clearly, there is a "reasonable expectation" that at least those named plaintiffs who have been returned to the regular school system on a trial basis will be again subjected to SMED school placement. *Weinstein* v. *Bradford, supra,* at 349; *Sosna* v. *Iowa, supra,* at 557-8. But there exists no likelihood that they will retain such standing until the case is fully litigated.*

It would appear that the Second Circuit should have taken jurisdiction over petitioners' appeal if it had properly applied the Supreme Court teachings in *Jacobs* and *Sosna* to the mandate that federal courts must give the requirement of "finality" under 28 U.S.C. §1291 "a practical rather than technical construction." *Eisen* v. *Carlisle & Jacquelin,* 417 U.S., *supra,* at 171; *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949). In fact, the appellate court's use of the "death knell" doctrine would have seemed to be appropriate.

> Where the effect of a district court's order [denying a class action motion], if not reviewed, is the death knell of the action, review should be allowed.

*During oral argument, the Second Circuit asked counsel why he couldn't intervene more plaintiffs. In response, counsel informed the Court that a "public interest" law firm should not be held to a higher standard than private lawyers (i. e., those who receive a fee as counsel in securities actions) and, in any event, although many persons are available for intervention and, in fact, are prepared to intervene, even intervenors who are in SMED schools when final judgment is made will most likely be discharged before exhaustion of appellate review.



*Eisen* v. *Carlisle & Jacquelin,* 370 F.2d, *supra,* at 120. See *Blackie* v. *Barrack,* 524 F.2d 891, 896 (9th Cir. 1975); *Ott* v. *Speedwriting Publishing Company,* 518 F.2d 1143, 1149 (6th Cir. 1975); *Monwich Asphalt Sales Co.* v. *Wilshire Oil Company of Texas,* 511 F.2d 1073, 1076-7 (10th Cir. 1975). *Contra: Hackett* v. *General Host Corporation, supra; King* v. *Kansas City Southern Industries,* 479 F.2d 1259 (7th Cir. 1973).

It is obvious that the death knell doctrine has created confusion among the Circuits. In fact, as recently as July, 1976, the Ninth Circuit said that "the theoretical bases for • • • 'death knell' appeals have not been properly articulated and are often confused." *Share* v. *Air Properties G. Inc.,* 538 F.2d 279 (9th Cir. 1976).

In any event, whether premised upon the "death knell" doctrine or a doctrine with a different name, when the denial of a class action will effectively terminate the litigation before the case is fully adjudicated, as it will in this case, the order must be deemed "final" in nature and, thus, appealable.

The Supreme Court's warnings in *Jacobs* and *Sosna* have little meaning if Circuit courts do not take jurisdiction over appeals from orders denying class certification when mootness will result before complete litigation.

**C. Propriety of District Court order.**

Although stated in dicta, the Second Circuit agreed with the reasoning of Judge Bruchhausen that petitioners' request for class certification should be denied because class status was "unnecessary." See Appendix "C." Since the appropriateness of the district court order is inextricably

intertwined with petitioners' right to appeal the order, petitioners are requesting the Supreme Court to rule on whether Judge Bruchhausen's order should be vacated. Petitioners suggest that class certification is necessary when its denial will narrow the scope of possible injunctive relief and ring the "death knell" of the action.

## CONCLUSION.

**The instant case presents the Supreme Court with an excellent opportunity to clarify the appealability of denials of class certification in civil rights actions. Hence, the petition for certiorari should be granted.**

Respectfully submitted,

GENE B. MECHANIC
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## APPENDIX.

## APPENDIX A.

**Decision and Order of the United States District Court for the Eastern District of New York Denying Class Certification.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

---

ISAAC LORA, *et al.*,

*Plaintiffs,*

*against*

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

*Defendants.*

No. 75 C 917
January 6, 1976

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Appearances:

Charles Schinitsky, Esq., The Legal Aid Society, Attorney for Plaintiffs.

Gene B. Mechanic, Esq., Deborah G. Steinberg, Esq., Of Counsel.

W. Bernard Richland, Esq., Corporation Counsel, Attorney for Defendants.

Joseph F. Bruno, Esq., Of Counsel.

*Memorandum and Order.*

BRUCHHAUSEN, D. J.

The plaintiffs move pursuant to Rule 23 of the Federal Rules of Civil Procedure for a determination that

this action be maintainable as a class action. Secondly, plaintiffs move for an order, pursuant to Rules 34 and 37 of the Federal Rules of Civil Procedure, compelling defendants to produce records, maintained by the Bureau of Child Guidance, and to inspect defendants special day schools for socially maladjusted and emotionally disturbed children.

This action was commenced pursuant to the Civil Rights Act, 42 U.S.C. 1981, 1983 and 2000(d) seeking injunctive and declaratory relief. The suit was instituted by seven Black and Hispanic children, assigned to public schools for socially maladjusted and emotionally disturbed children (SMED Schools), also referred to as "600" schools, under the jurisdiction of the Board of Education of the City of New York. It is claimed that placement in these schools violates plaintiffs' rights under the Eighth, Thirteenth, and Fourteenth Amendments to the United States Constitution.

The suit is also against individual local and state defendants, as well as the named defendants, who, as assistant high school superintendents, community school district superintendents or public school principals, members of a class, who are authorized to approve the transfer to the SMED schools.

In brief, it is alleged that the rights of the plaintiffs to due process, equal protection, equal educational opportunity, and to be free from involuntary servitude are being violated as a result of being placed into these special day schools whose population is overwhelmingly Black and Hispanic, without providing them with adequate and appropriate education. Plaintiffs contend that less than 10% of these children attending these schools will earn a high school diploma, and that by being "pushed out" of their regular schools the defendants have failed to provide these children with an adequate academic program. Also less restrictive and more effective educational alternatives can be used. It is alleged that



these assignments are made without any evidentiary hearing to determine if these assignments are justified. That these "600" schools are sexually segregated and that the practice of daily searches of the students for weapons violates their rights to be free from unreasonable search and seizure, and to their rights of privacy. Furthermore, the defendants' use of corporal punishment or excessive use thereof results in cruel and unusual punishment in violation of due process of law. Finally, these special educational classes are not conducted within the regular public schools, which would provide the "600" students with smaller classes and additional staff resources.

The plaintiffs seek to have the above acts declared unconstitutional.

The defendants argue that the SMED schools provide proper and meaningful education and clinical programs to aid these students, and in no respect, violate any of their guaranteed rights.

The defendants urge that the SMED schools are under the specific control of the Bureau for the Education of Socially Maladjusted and Emotionally Disturbed Children (BSMEDC), which is a bureau within its centralized Division of Special Education and Pupil Personnel Services (DSEPPS), which operates a program for the education of all handicapped and emotionally disturbed children. That the SMED schools are geared to instruct these students in the regular academic subjects with individualized programs wherein the student and teacher become closely involved on a personal basis. That each SMED school is assigned clinical personnel and working together creates a comprehensive educational and therapeutic environment for these disturbed students. That each student prior to placement in a SMED school is screened and must be clinically assessed by professionals to determine whether the student is handicapped and whether SMED school placement is appropriate. Also

parental consent is required of each stage of this procedure. That sexual segregation is based upon sound educational reasoning because coeducational classes would result in overwhelmingly (*sic*) ratios of boys to girls. That there is no practice of daily searches of the students, and that corporal punishment is expressly forbidden. Finally, these SMED schools operate as a viable and useful educational tool established to assist any emotionaly handicapped student, within constitutional guidelines.

The court in determining whether a class certification is appropriate is referred to *Galvan v. Levine,* 490 F.2d 1255, cert. denied 417 U.S. 936, in which the court held in part at page 1261:

> "• • • But insofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality, at least for the plaintiffs. As we have recently noted in *Vulcan Society v. Civil Service Comm'n,* 490 F.2d 387, 399 (1973), what is important in such a case for the plaintiffs or, more accurately, for their counsel, is that the judgment run to the benefit not only of the named plaintiffs but of all other similarly situated, see *Bailey v. Patterson,* 323 F.2d 201, 206-207 (5 Cir. 1963), cert. denied, 376 U.S. 910, 84 S.Ct. 666, 11 L.Ed.2d 609 (1964); cf. *United States v. Hall,* 472 F.2d 261, 266 (5 Cir. 1972), as the judgment did here. The State has made clear that it understands the judgment to bind it with respect to all claimants; • • •."

In *Thomas v. Weinberger,* 384 F. Supp. 540 (1974) (S.D.N.Y.), the court held in part at page 543:



> "• • • However, class action status is unnecessary in this case since any relief which might be ordered on behalf of the named plaintiffs as individuals with respect to the hearing rights mandated by due process and the adequacy of the present procedures would necessarily inure to the benefit of the class as a whole. See, e. g., *Galvan v. Levine,* 490 F. 2d 1255 (2d Cir. 1973), cert. denied, 417 U.S. 936, 94 S.Ct. 2652, 41 L.Ed.2d 240 (1974); *Tyson v. New York City Housing Authority,* 369 F. Supp. 513 (S.D.N.Y. 1974); *McDonald v. McLucas,* 371 F. Supp. 831 (S.D.N.Y. 1974), • • •. The motion for class action determination is accordingly denied."

In the case at bar, the defendants urge that a class action is unnecessary, and concede that in the event the plaintiffs are successful, all present practices will be terminated. It is also urged that the plaintiffs have failed to meet the requirements of Rule 23 for certification as a class action.

It is unnecessary to consider whether the requirements of Rule 23 have been satisfied, because the court after a consideration of all arguments and applicable law above referred to concludes that a class action status is unnecessary.

The motion to compel discovery of the defendants files and records is granted, subject to the conditions stated in the affidavit of Joseph F. Bruno, Esq., sworn to the 28th day of November, 1975.

It is so ordered.

A pre-trial conference shall be scheduled for March 15, 1976, at 10 A.M. in Part 3 of this Court.

Copies hereof will be forwarded to the attorneys for the respective parties.

s/ WALTER BRUCHHAUSEN
*Senior U. S. D. J.*

## APPENDIX B.

### Order of United States Court of Appeals for the Second Circuit Dismissing Appeal.

AMENDED

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of May one thousand nine hundred and seventy-six.

Present:

Hon. Paul R. Hays,
Hon. William H. Mulligan, C.J.J.
Hon. Edmund L. Palmieri, D.J.
Circuit Judges.



ISAAC LORA, by his mother and legal guardian, Carmen Lora, KELVIN WALTERS, by his mother and legal guardian Rita Walters, RANJEET MARTIN, by his mother and legal guardian, Thelma Moore, LAWRENCE WHITE, by his mother and legal guardian, Mulvinina White, MELVIN PRINCE, by his mother and legal guardian, Joann Prince, FRANCISCO LUGO, by his attorney, Charles Schinitsky, on behalf of themselves and all other similarly situated,

*Plaintiffs-Appellants,*

*v.*

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, JAMES F. REGAN, individually and in his official capacity as President of the Board of Education of the City of New York, ISAIAH E. ROBINSON, Individually and in his official capacity as Vice-President of the Board of Education of the City of New York, AMELIA H. ASHE, JOSEPH MONSERRAT, ROBERT CHRISTEN, JOSEPH G. BARKAN, STEPHEN R. AIELLO, individually and in their capacity as members of the Board of Education of the City of New York,

*Defendants-Appellees.*

76-7036

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court denying the preliminary injunction be and it hereby is affirmed.

It is further ordered, adjudged and decreed that the appeal from the order denying class action certification be and it hereby is dismissed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk
by: Vincent A. Carlin
Chief Deputy Clerk



## APPENDIX C.

### Transcript of Oral Decision of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS,

For the Second Circuit.

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Isaac Lora, etc., *et al.*

*v.*

Board of Education of the City of New York, *et al.*

Docket No. 76-7036

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Before:

Mulligan, Hays, *Circuit Judges,* Palmieri *District Judge.*

New York, N.Y.
May 5, 1976.

Statement made by the Court at the disposition of the appeal in open court.

We have read the briefs and we have considered the argument. First, we are affirming. With respect to the preliminary injunctions, we feel that there was no abuse of

discretion at all, that there is no showing of any probability of success, that as a matter of fact the new regulations which are effective as of the first of May, in our opinion practically moot the action. Moreover the function of the preliminary injunction is to preserve the status quo, not to change it, and here the relief sought would do that. With respect to the class action, we find it is not appealable under *Eisen* 1. Also as the Court said below any judgment entered here will automatically inure to the benefit of all the so called class claimants, and I cite to *Galvin v. Levine* in 490 Fed. 2nd 1261. So for these reasons we affirm.



## APPENDIX D.

### Order of United States Court of Appeals for the Second Circuit Denying Rehearing *en banc.*

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 20th day of July, one thousand nine hundred and seventy-six.

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ISAAC LORA, etc.,

*Plaintiffs-Appellants,*

*v.*

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

*Defendants-Appellees.*

Docket No. 76-7036

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellants, Issac Lora, etc., and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN
Chief Judge

## APPENDIX E.

### Relevant Statutes.

Federal Rules of Civil Procedure

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

• • •

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or . . .

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.



28 U.S.C. § 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . .